

Tuesday, June 6.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SMALL v. M'CORMICK & EWING.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), Sched. 1 (1) (b)—Method of Calculating "Average Weekly Earnings"—Piece-Labourer.

Held that in the case of a piece-labourer engaged by the hour, paid by the day, and employed at irregular intervals, the average amount of his weekly earnings must be determined under the Workmen's Compensation Act 1897, by dividing the total amount of his wages by the number of weeks contained in the period over which, as found in fact by the Sheriff, his employment had extended.

This was an appeal from an award by the Sheriff-Substitute of Lanarkshire at Glasgow (Spens) in an arbitration under the Workmen's Compensation Act 1897 between Mary Waterson or Small and M'Cormick & Ewing, licensed general weighers and samplers, Glasgow. The claim of the former was for £300 in respect of her husband's death from injuries accidentally sustained while in the employment of the latter.

The following facts were set forth by the Sheriff-Substitute in the stated case as having been established by the proof:—“(1) That the deceased Thomas Small was employed by the defenders as a dock labourer on 4th November 1898, and was on that date killed at Princes Dock, in consequence of the handle of a certain hand-crane which he was using in connection with the lowering of bales of esparto grass revolving from some unexplained cause too rapidly, and thus striking him on the head; (2) that the deceased had been employed by the defenders from October 1896 onwards to the date of his death at irregular intervals for a period amounting in all to 77 days, and was paid in all the sum of £21, 15s. 9d. for the work performed by him, as follows:—[Here followed a detailed statement of the days and hours worked by the deceased for M'Cormick & Ewing, and of the amount earned by him.] (3) That deceased was employed by the hour, could leave or be dismissed from his employment at the end of any hour, but his wages for convenience were paid to him at the end of each day for the number of hours he had worked during that day. ‘On these facts,’ continued the Sheriff, ‘I found that the sum which fell to be divided between the widow and children was £261, 5s., made up as follows:—I divided the 77 days during which deceased worked with appellants by 6, being the lawful working days of a week, I then divided the £21, 15s. 9d. by the number of weeks so ascertained, and brought out the sum of £1, 13s. 6d. as the average weekly earnings of deceased, and multiplying this by 156 brought out the total sum of £261, 5s.’

The following questions of law were sub-

mitted by the appellants M'Cormick & Ewing for the opinion of the Court:—“1. Are the dependents of the deceased Thomas Small, looking to the nature of his employment, entitled on his death to compensation under the Workmen's Compensation Act 1897? 2. On the assumption that this first question is answered in the affirmative, is the amount of compensation awarded in accordance with the provisions of the Workmen's Compensation Act and relative schedules?”

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), Schedule 1, sec. 1 (b), enacts that “where total or partial incapacity for work results from the injury,” the amount of compensation under the Act shall be “a weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings during the previous twelve months.”

Argued for the appellants—The Workmen's Compensation Act 1897 made the “average weekly earnings” the unit of calculation in determining the amount of compensation. The Sheriff's method of arriving at the result was quite erroneous. The true method was to take the period of employment as fixed by the Sheriff—viz., from 29th October 1896 to 4th November 1898—to ascertain the number of weeks in that period; to divide the total amount of wages by that amount, and then to multiply the quotient by 156, the number of weeks in three years.

This process ($\frac{£21\ 15s.\ 9d.}{105} \times 156$) gave as a result £36, 9s. 2d. in place of the total of £261, 5s. awarded by the Sheriff. The principle of the Act of 1897 was to regard the workman's actual and not his potential earnings. This method of calculation had been followed in *Keast v. Barrow Hematite Steel Co.*, 15 T.R. 141, and in *Price v. Marsden & Sons*, L.R. [1899], 1 Q.B. 493.

[Counsel in opening for the reclaimers also submitted an argument that piece-labourers, or any labourers engaged for less than a week, did not fall within the scope of the Act of 1897, but the point was not argued by senior counsel.]

The respondent argued—Granted that the Sheriff's method of calculation could not be defended, that of the appellants was equally erroneous. The reasonable method was to take the number of weeks during the whole or any portion of which the deceased was employed by the appellants, and to divide the total by that. The result was a weekly average of 18s. 1d. per week. in place of 4s. 2d., and a total sum of £141. This result of the appellants' mode of calculation would be that a man regularly employed for a week would be in a better position than a man who had been employed for several years though his work had been intermittent. The Sheriff's statement showed that in the employment of the deceased by the appellants there had been a gap of five months, from July to December 1897. That period, at all events, should be excluded from the reckoning in endeavouring to ascertain and fix the average weekly earnings.

LORD PRESIDENT—In determining this question we must steadily bear in mind that the Act under consideration does not profess to give compensation upon common law grounds. This man has lost his life, and if we had a jury here they would rightly take into account in fixing the amount of compensation not merely the earnings of the man (who was a piece-labourer) in the employment of those in whose service he was killed, but they would consider his earnings from A, B, C, and D to the end of the alphabet, in order to ascertain what his relatives had lost by his being deprived of life.

But the theory of this Act is totally different, for the Act concentrates attention upon the earnings from the employer from whom compensation is claimed. That is very clearly brought out by the decision in the case of *Price* in the Court of Appeal to which we were referred. We must therefore attend closely to the terms of the Act, in order to find out how the rather artificial calculation is to be worked out.

To my thinking the first question is, how long—during what period—has the man been in the employment of the respondents? That he has not been for three years is found as matter of fact. He has been for a shorter period. For how long? Now, I find that the Sheriff has decided that question, and found as a matter of fact that the deceased was employed by the appellants from 29th October 1896 to 4th November 1898. It seems to me, therefore, that the period is decided for us to be the period from 29th October 1896 to 4th November 1898, and that comes to 105 weeks. Now, what did he earn? He earned, in the aggregate over the whole period, £21, 5s. 9d. I say that you must divide that sum by 105, and that gives you 4s. 2d. You then proceed to multiply 4s. 2d. by 156, and that gives you £32, 9s. 2d.

I can find no escape from that principle or method of calculation. I own that it is not quite in accord with our ideas of common law compensation, while on the other hand the formula given does not very well fit in with the case of a piece labourer. Still it was, I will not say conceded, but not seriously disputed that such piece-labourers are within the Act, and if they are, then if the formula provided in the schedule of the Act gives them less than other people we cannot help that.

We must answer the first question in the affirmative and the second in the negative, and remit to the Sheriff.

LORD ADAM—I entirely agree. I think that part of the apparent hardship of this case arises from the parties not having had their attention sufficiently directed to the period during which the deceased was in the employment of the appellants. I could quite well have understood an argument to the Sheriff that he must at any rate exclude every period before the interval of five months, and for anything I know that argument might have been successful. But that has not been done, and as your Lordship says, we must take the period of

employment in this case as running from October 1896 to November 1898. That being so, I think the words of the Act are clear.

LORD KINNEAR—I concur. I am quite clearly of opinion that the first question must be answered in the affirmative. As to the second question, I agree with your Lordship that if the period of employment be taken from October 1893 to November 1898 there is no escaping the conclusion which your Lordship intimated. I express no opinion, and have none, as to whether that is the proper period of employment to be adopted as the basis for calculating compensation or not. That is not a question for us and is not before us. But upon the assumption that it is the proper period which is the assumption of the argument and of the case presented to us, I am unable to see any answer to your Lordship's reasoning.

LORD M'LAREN was absent.

The Court answered the first question in the affirmative and the second in the negative, recalled the award, instructed the Sheriff as arbitrator that the sum to be divided between the widow and children is £32, 9s. 2d., and remitted to the Sheriff to proceed.

Counsel for the Pursuer—Watt—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—Ure, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Tuesday, June 6.

SECOND DIVISION.

LAING'S TRUSTEES v. HAMILTON.

Succession—Fee and Liferent—Fee Subject to Restriction—Vesting.

A truster directed his trustees to divide equally among "all my children" two-thirds of his estate. As regards the shares of three of his children—George, Charlotte, and Robert—he directed his trustees to hold them till they respectively attained twenty-one years or were married, "when the share of each of them shall be payable to him or her on respectively attaining majority or being married;" declaring that the trustees should, till said three children attained majority or were married, apply the whole or part of the interest of their respective shares towards their maintenance and education; and further declaring that in the event of any of said children dying without leaving lawful issue, the share of such predeceaser should be divided equally among the truster's whole surviving children or their issue.

By a codicil the truster directed his trustees to pay to his daughters Elizabeth, Jane, and Charlotte the annual interest or profits of the shares pro-